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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO PENILLA, Defendant and Appellant.	E064445 (Super.Ct.No. FWV1303255) OPINION

APPEAL from the Superior Court of San Bernardino County. Shahla Sabet, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

David Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Antonio Penilla successfully requested that the superior court reclassify his prior conviction for possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), as a misdemeanor under Proposition 47, the Safe Neighborhoods and Schools Act (Pen. Code, § 1170.18). However, the superior court denied defendant's additional request to strike the one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) associated with the prior possession conviction, when it ordered execution of defendant's current prison sentence upon revocation of probation. Defendant appeals, contending his prior conviction has been reclassified as a misdemeanor for all purposes (Pen. Code, § 1170.18, subd. (k)) and, therefore, it can no longer be used to enhance his current sentence.

We agree that a prior conviction, which has been reclassified as a misdemeanor, may not be used to enhance a felony sentence prospectively. However, reclassification of a prior felony conviction has no retroactive effect on final judgments. Because the trial court imposed defendant's felony sentence and suspended execution thereof when it placed him on probation, and defendant did not timely appeal, the judgment became final and the later reclassification of defendant's prior conviction has no effect on the judgment. Therefore, we affirm.

I.

PROCEDURAL BACKGROUND

On September 30, 2013, the People charged defendant by felony complaint with one count of inflicting corporal injury on a spouse, cohabitant, or child's parent (Pen.

Code,[1] § 273.5, subd. (a), count 1), one count of possessing methamphetamine for sale (Health & Saf. Code, § 11378, count 2), and one misdemeanor count of resisting, obstructing, or delaying the lawful exercise of duty by a peace officer (Pen. Code, § 148, subd. (a)(1), count 3). The complaint also alleged defendant suffered nine prior prison terms. (Pen. Code, § 667.5, subd. (b).)

On November 13, 2013, defendant pleaded no contest to inflicting corporal injury as alleged in count 1, and admitted to suffering two prior prison terms, to wit, possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and second degree burglary (Pen. Code, § 459). The following month, the trial court denied defendant probation. He was sentenced to the upper term of four years on count 1. The court also imposed two one-year enhancements for the admitted prior prison terms, to be served consecutively with the sentence on count 1, for a total term of six years in state prison. The trial court then suspended execution of the sentence, and granted defendant supervised probation for three years, with various terms and conditions. The trial court granted a motion from the prosecutor to dismiss the remaining counts and prior prison term allegations. (Pen. Code, § 1385.) Defendant did not appeal.

The trial court revoked defendant's probation on April 9, 2014, when he failed to appear for a probation review hearing. At a June 25, 2014 hearing on the violation, the trial court reinstated defendant's probation. Defendant appeared for a probation review hearing on July 10, 2014, but he left the courtroom before the prosecutor made her

[1] All additional undesignated statutory references are to the Penal Code.

appearance. The court revoked defendant's probation, issued a bench warrant for his arrest, and ordered the People to file a petition to revoke defendant's probation. The People filed their petition the next day, alleging defendant violated the terms of his probation by (1) committing a new crime, (2) failing to enroll in and complete a one-year Salvation Army residential program, and (3) leaving the June 25, 2014 review hearing before his case was called.

The formal hearing on defendant's probation violation was continued several times, during which time defendant's probation was revoked. At the August 7, 2015 probation revocation hearing, defendant admitted he had violated his probation by failing to appear at the review hearing and by committing a new crime. The trial court accepted the admissions, revoked and terminated his probation, and set a hearing for sentencing. During a discussion of sentencing, defense counsel requested that defendant's prior conviction for possessing a controlled substance be reclassified as a misdemeanor under Proposition 47. The People conceded defendant was eligible to have his prior possession conviction reclassified, and the court granted the request.[2]

The day before the sentencing hearing, defendant filed a brief arguing his newly reclassified prior conviction for possessing a controlled substance could no longer be the basis for a sentence enhancement, and that the trial court should "set aside" his "prior

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[2] Defendant did not request that his prior conviction for second degree burglary also be reclassified as a misdemeanor. The People informed the trial court that the burglary was of a "closed business" and, therefore, was not eligible for reclassification as misdemeanor shoplifting under Proposition 47. (§ 459.5.) The trial court noted the prior conviction for second degree robbery "will remain as a felony."

conviction enhancements" and sentence him appropriately. The People opposed the request. At the August 27, 2015 sentencing hearing, the trial court denied defendant's request to strike the one-year enhancement based on his prior possession conviction. The court then ordered execution of the previously suspended six-year state prison sentence.

Defendant timely appealed.

II.

DISCUSSION

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id*. at p. 1092.) "Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subds. (f); see *id*., subds. (g)-(h).)" (*Id*. at p. 1093.) "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

Defendant contends the resentencing provisions under section 1170.18 apply retroactively to prior convictions used to enhance the sentence on non-Proposition 47 eligible felonies because, by its terms, a felony wobbler that is reclassified or designated as a misdemeanor "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) The issue of whether a defendant is entitled to be resentenced on a current case after the superior court designates as a misdemeanor a prior conviction used to enhance the current sentence is pending before the California Supreme Court. (*People v. Valenzuela*, review granted March 30, 2016, S232900.) We conclude the trial court correctly denied defendant's request to strike the one-year enhancement based on defendant's now reclassified prior conviction for possessing a controlled substance.

The courts have held that reclassification of a prior felony conviction under Proposition 47 applies prospectively to enhancements, and that it does not apply to enhancements of sentences that are final. In *People v. Abdallah* (2016) 246 Cal.App.4th 736, the trial court recalled the defendant's prior conviction for possessing methamphetamine, reclassified the conviction as a misdemeanor under Proposition 47, then sentenced defendant to a year in jail with credit for time served. (*Abdallah*, at pp. 740-741.) However, when the court sentenced defendant on his current felony convictions, it imposed a one-year sentence enhancement under section 667.5, subdivision (b), for the same prior conviction. (*Abdallah*, at pp. 740-741.) The Court of Appeal held the trial court erred: "Once the trial court recalled Abdallah's 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at

the time of sentencing in this case, Abdallah was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years of his release on parole for his prior conviction. [Citations.] Thus, the trial court erred by imposing the one-year sentence enhancement under section 667.5, subdivision (b)." (*Id*. at p. 746.)

In *People v. Jones* (2016) 1 Cal.App.5th 221 (*Jones*), the defendant pleaded guilty in his current felony case and admitted to suffering a prior prison term for petty theft with a prior (§ 666).[3] (*Jones*, at p. 225.) The trial court sentenced the defendant to three years in county jail for the current offense and to a consecutive term of one year for the prior prison term. (*Id*. at pp. 225-226.) After passage of Proposition 47, the defendant successfully petitioned to have his prior conviction for petty theft with a prior reclassified as a misdemeanor. (*Jones*, at p. 226.) The defendant then petitioned the court in his current case to reclassify as a misdemeanor a prior conviction for second degree burglary (a prior he did not admit as part of his plea and that the trial court struck), and to reduce his current sentence by one year based on the reclassification of his prior conviction. (*Ibid*.) The trial court denied the request to reduce the sentence. (*Id*. at p. 227.)

In *Jones*, a panel of this court affirmed the denial of the defendant's request for a sentence reduction. This court held the provisions giving Proposition 47 retroactive effect do not apply to enhancements: "The focus of these procedures is redesignation of

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[3] The Supreme Court granted review in *Jones*, *supra*, 1 Cal.App.5th 221, on September 14, 2016, S235901. Under a recent amendment to rule 8.1115 of the California Rules of Court, we may rely on the Court of Appeal's decision as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

convictions, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. (§ 1170.18, subds. (a), (b), (f), (g).) No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*Jones*, *supra*, 1 Cal.App.5th at pp. 228-229.)

Relying on section 1170.18, subdivision (k), Jones argued a reclassified felony conviction is a misdemeanor "for all purposes," and the trial court was required to reduce his sentence by striking the one-year enhancement. (*Jones*, *supra*, 1 Cal.App.5th at p. 229.) This court disagreed: "We assume, without deciding, that subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves *prospective* application of section 1170.18, subdivision (k). The second case, which describes Jones's situation, involves its *retroactive* application." (*Id.* at p. 229.) Because this court concluded section 1170.18, subdivision (k), does not apply retroactively to sentence enhancements that are final, we concluded the trial court

correctly denied the defendant's request to reduce his current sentence. (*Jones*, at pp. 229-230.)

Whether the one-year sentence enhancement based on defendant's now reclassified prior conviction should be stricken depends on whether defendant's current felony sentence was final before the passage of Proposition 47. Finality in probation cases turns on whether the trial court suspended imposition of the sentence or merely suspended execution of the sentence.

"When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of probation. [Citations.] The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.' [Citation.] On the defendant's rearrest and revocation of her probation, '. . . the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. [Citations.]" (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) "Unlike the situation in which sentencing itself has been deferred, where a sentence has actually been imposed but its execution suspended, 'The revocation of the suspension of execution of the judgment brings the former judgment into full force and effect . . . .' [Citations.]" (*Ibid*.) When the trial court imposes a sentence but suspends its execution, and later revokes probation, "the sentencing judge must order that exact sentence into effect [citations], subject to its possible recall under section 1170, subdivision (d), *after* defendant has been committed to custody." (*Id*. at p. 1088.)

"An order imposing sentence, the execution of which is suspended and probation granted, is an appealable order. [Citation.] When that order is not appealed, it becomes final. [Citations.] 'This is so regardless of the fact the defendant will not serve the sentence unless the court revokes and terminates probation before the probationary period expires.' [Citation.]" (*People v. Martinez* (2015) 240 Cal.App.4th 1006, 1011-1012.) "The trial court is without jurisdiction to modify or change a final judgment and is required to order into execution that judgment after revocation of probation. [Citations.]" (*Id*. at p. 1012.)

The courts have held that a probationer is entitled to the benefit of a subsequent ameliorative statute or amendment if his or her judgment is not final because the trial court suspended imposition of the sentence. For example, the defendant in *People v. Eagle* (2016) 246 Cal.App.4th 275 (*Eagle*) pleaded no contest to one count of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and to resisting, obstructing, or delaying the lawful exercise of duty by a peace officer (Pen. Code, § 148, subd. (a)(1)), and admitted to suffering a prior prison term (Pen. Code, § 667.5, subd. (b)). The trial court suspended imposition of sentence and placed the defendant on probation for three years. (*Eagle*, at p. 278.) After passage of Proposition 47, which amended Health and Safety Code section 11379, the defendant moved to vacate his conviction for transporting methamphetamine and to replace it with a conviction for misdemeanor possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court denied the request. (*Eagle*, at p. 278.)

On appeal, the Court of Appeal noted that before passage of Proposition 47, the Legislature amended Health and Safety Code section 11379 "to criminalize the transportation of drugs for the purpose of sale and not the transportation of drugs for nonsales purposes such as personal use. [Citation.]" (*Eagle, supra,* 246 Cal.App.4th at p. 278.) The threshold question in determining whether defendant was entitled to relief under the amendment turned on whether his judgment of conviction was final. "Generally, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' if the amended statute takes effect before the judgment of conviction becomes final. (*In re Estrada* (1965) 63 Cal.2d 740, 744. . . .) Here, the People concede defendant's sentence was not final at the time the amendments to [Health and Safety Code] section 11379 took effect, as the trial court had suspended imposition of sentence and placed defendant on probation. The People also concede that because the judgment was not final, defendant is entitled to benefit retroactively from the changes to section 11379. On these points, we agree."[4] (*Eagle,* at p. 279.)

In contrast, the courts have held a probationer's judgment is final, and he is therefore not entitled to the benefit of a subsequently enacted ameliorative statute or

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[4] Although the Court of Appeal concluded the amendment to Health and Safety Code section 11379 applied in defendant's nonfinal case, it also concluded misdemeanor possession of methamphetamine is not a lesser included offense of felony possession of methamphetamine for sale and, therefore, the trial court could not simply reduce the defendant's conviction to a misdemeanor. Instead, the court held the People had the right on remand to establish the element of transportation for *sale*, which was added by the amendment. (*Eagle, supra,* 246 Cal.App.4th at pp. 279-280.)

amendment, if the trial court imposed sentence and merely suspended execution thereof. For example, the defendant in *People v. Scott* (2014) 58 Cal.4th 1415 (*Scott*) pleaded guilty to possessing cocaine base for sale (Health & Saf. Code, § 11351.5), admitted to suffering a prior conviction for possessing cocaine base (Health & Saf. Code, § 11370.2, subd. (a)), and was sentenced to seven years in state prison. (*Scott*, at p. 1420.) The trial court suspended execution of the sentence, and placed the defendant on probation for three years. (*Ibid.*) The court thereafter revoked the defendant's probation and lifted the suspension of his sentence, but continued the sentencing hearing to permit the parties to brief the issue of whether the defendant should serve his sentence in county jail instead of state prison, pursuant to the subsequently enacted Criminal Justice Realignment Act of 2011 (the Realignment Act or the Act). (*Scott*, at p. 1420.) Thereafter, the trial court ordered the defendant to serve his term in county jail. (*Ibid*.)

On the People's appeal, the Supreme Court concluded the defendant was not entitled to serve his sentence in county jail because he had not been "'sentenced'" after the passage of the Realignment Act. (*Scott, supra,* 58 Cal.4th at p. 1424; see § 1170, subd. (h)(6).) The Supreme Court cited *People v. Howard*, *supra*, 16 Cal.4th 1081, as "establish[ing] that when a court elects to impose a sentence, a judgment has been entered and the terms of the sentence have been set even though its execution is suspended pending a term of probation." (*Scott*, at p. 1424.) Applying the principle of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions in effect at the time it enacts or amends a statute, the Supreme Court concluded the Legislature did not intend the term "'sentenced'" as used in the Realignment Act to

apply to a probationer whose judgment was final before passage of the Act because the trial court imposed a sentence and merely suspended execution thereof. (*Scott*, at pp. 1424, 1426.)

The record in this case is clear. After defendant pleaded no contest to inflicting corporal injury and admitted to suffering a prior conviction for possessing a controlled substance, the trial court denied defendant probation and sentenced him to six years in state prison. The court then suspended *execution* of the sentence and placed defendant on probation for three years. Defendant did not appeal from that order, and it became final before the passage of Proposition 47. (*People v. Martinez*, *supra*, 240 Cal.App.4th at pp. 1011-1012.) Because defendant's current sentence was final well before the trial court revoked his probation and reclassified his prior conviction as a misdemeanor, we conclude Proposition 47 does not apply to defendant's current sentence. (*Jones*, *supra*, 1 Cal.App.5th at pp. 229-230.)

III.

DISPOSITION

The post-judgment order is affirmed.

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McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.